

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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GAIL E. PORTER,

Case No. 2:15-CV-661 JCM (NJK)

Plaintiff(s),

ORDER

V.

SOCIAL SECURITY ADMINISTRATION,
et al.,

Defendant(s).

Presently before the court are Magistrate Judge Koppe's report and recommendation that *pro se* plaintiff Gail Porter's motion for reversal or remand (ECF No. 33) be denied and that defendant social security administration's ("SSA") cross-motion for summary judgment (ECF No. 34) be granted. On August 29, 2016, plaintiff filed a timely objection to the report and recommendation. (ECF No. 40). On September 9, 2016, defendant filed a response to the objection (ECF No. 41), and plaintiff subsequently filed a reply (ECF No. 42). Plaintiff later filed a second objection on November 28, 2016. (ECF No. 45).

The magistrate judge’s report and recommendation considered the administrative law judge’s (“ALJ”) decision based on the administrative record (“A.R.”). (ECF No. 39). The magistrate judge articulated plaintiff’s argument as stating that the ALJ erred by: (1) conducting the two-step credibility analysis improperly; and (2) failing to consider the vocational adjustments necessary in light of plaintiff’s age. (ECF Nos. 33, 39).

The report and recommendation found that the ALJ's determination that plaintiff's testimony was not credible was supported by clear and convincing evidence, such as "prior inconsistent statements, lack of consistent treatment, and the contrary medical evidence." (ECF No. 39 at 7) (citing A.R. 18–20). Next, the magistrate judge found that the ALJ's determination that plaintiff could perform past work was appropriate, conducting three separate considerations

1 of “residual functional capacity,” “the physical and mental demands of the past job,” and whether
 2 “[plaintiff’s] residual functional capacity would permit a return” to prior employment. (ECF No.
 3 at 39) (citing *Ocegueda v. Colvin*, 630 Fed. Appx. 676, 677 (9th Cir. 2015) (citing Social Security
 4 Ruling 82-62, 1982 WL 31386, at *4)). Additionally, the report and recommendation indicate that
 5 plaintiff challenges step five of the “five-step sequential evaluation process”; however, step four,
 6 which remains unchallenged, provides the ALJ with sufficient grounds for reaching the decision
 7 at issue. 20 C.F.R. § 416.920; *see also* (ECF Nos. 33, 39).

8 The magistrate judge also refused to remand the case in light of plaintiff’s additional
 9 evidence, finding that plaintiff had failed to show that the evidence was material or that she had
 10 good cause for failing to offer that evidence earlier. (ECF No. 39) (citing *Mayes v. Massanari*,
 11 276 F.3d 453, 461–62 (9th Cir. 2001)). However, the report and recommendation explicitly stated
 12 that plaintiff should not be barred “from filing a new application for benefits in the event that she
 13 can now prove a disabling physical or mental condition as of the date of any new application.”
 (ECF No. 39 at 10).

14 This court “may accept, reject, or modify, in whole or in part, the findings or
 15 recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). If a party fails to object to a
 16 magistrate judge’s report and recommendation, however, the court is not required to conduct “any
 17 review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140,
 18 149 (1985). Indeed, the Ninth Circuit has recognized that a district court is not required to review
 19 a magistrate judge’s report and recommendation where no objections have been filed. *See United*
 20 *States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review
 21 employed by the district court when reviewing a report and recommendation to which no
 22 objections were made); *see also Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003)
 23 (reading the Ninth Circuit’s decision in *Reyna-Tapia* as adopting the view that district courts are
 24 not required to review “any issue that is not the subject of an objection.”).

25 Plaintiff has filed an objection to the report and recommendation; therefore, this court finds
 26 it appropriate to engage in a *de novo* review to determine whether to adopt the recommendation of
 27 the magistrate judge. *See* (ECF No. 40). As it is relevant to the instant action, plaintiff objects to
 28 the report and recommendation by contesting, somewhat ambiguously, the ALJ’s consideration of
 her medical records and determination of her ability to perform prior work. (*Id.*).

1 Defendant's response to that objection argues that this court is required to answer only the
 2 question of "whether substantial evidence supports the ALJ's finding that Plaintiff was not
 3 disabled between April 28, 2011 and September 26, 2013." (ECF No. 41 at 2). Further, this court
 4 will not consider the documents attached to plaintiff's reply; plaintiff has failed to show that the
 5 documents are material or that she had good cause for not producing those documents earlier in
 6 this case, particularly because some of those records were created after the administrative
 7 proceeding had concluded.¹ *See Mayes*, 276 F.3d at 461–62; *compare* (A.R. 12), *with* (ECF No.
 8 42-1).

9 With respect to plaintiff's objection to the ALJ's consideration of her medical history, she
 10 does not argue how the ALJ did not adequately assess the timely submitted evidence on the
 11 administrative record. (ECF No. 40). Moreover, her subjective belief regarding her employment
 12 prospects is most relevant, if at all, to the fifth step of the disability evaluation, which the report
 13 and recommendation has correctly indicated is adequately supported in this case because of the
 14 ALJ's determination of the previous, fourth step. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533
 15 F.3d 1155, 1162 (9th Cir. 2008); 20 C.F.R. § 404.1520; *see also* (ECF No. 39). Therefore,
 16 plaintiff's objection is not persuasive that the report and recommendation have erred in their
 17 assessment of the relevant motions in this case.

18 This court now turns to assessing *de novo* the report and recommendation's treatment of
 19 the underlying motions. First, the magistrate judge properly construed plaintiff's motion. *See*
 20 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Second, the magistrate judge correctly
 21 articulated and applied the two-stage credibility analysis to the ALJ's evaluation of plaintiff's case,
 22 and the ALJ did, in fact, provide "specific, clear, and convincing" reasons for rejecting plaintiff's
 23 testimony based on "prior inconsistent statements, lack of consistent treatment, and the contrary
 24 medical evidence." (ECF No. 39 at 6–7) (citing *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir.
 25 2009)); *see also* (A.R. 18–20). Moreover, the report and recommendation accurately stated that
 26 the ALJ satisfied the duty to make factual findings regarding plaintiff's capabilities, the demands
 27 of past employment, and how those findings reconcile. (ECF No. 39 at 9); *see also* (A.R. 20).

28 ¹ Furthermore, this court will not consider plaintiff's second objection to the report and
 29 recommendation because it was filed roughly two and a half months after the deadline for filing
 30 an objection had elapsed and because plaintiff had already filed one timely objection. (ECF Nos.
 31 40, 45).

Upon review, this court will adopt the magistrate judge's report and recommendation. (ECF No. 39). However, this court also wishes to echo the magistrate judge's emphasis that “[n]othing in this order should be construed as preventing Plaintiff from filing a new application for benefits in the event that she can now prove a disabling physical or mental condition as of the date of any new application.” (ECF No. 39 at 10) (citing *Osenbrock v. Apfel*, 240 F.3d 1157, 1164 n.1 (9th Cir. 2001)).

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the report and recommendation of Magistrate Judge Koppe (ECF No. 39) be, and the same hereby are, ADOPTED in their entirety.

The clerk shall enter judgment accordingly and close the case.

DATED January 27, 2017.

Xenos C. Mahan
UNITED STATES DISTRICT JUDGE